United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

76-4040

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

STANFORD GEORGE BOOTHE, :

Petitioner, : Docket No. 76-4040

- v - :

IMMIGRATION AND NATURALIZATION SERVICE :

:

Respondent. :

- X

B
P/S

PETITION FOR REVIEW OF AN ORDER
OF THE BOARD OF IMMIGRATION APPEALS

- X

BRIEF AND APPENDIX FOR PETITIONER

- X

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Questions Presented

1. Whether either the Immigration & Nationality Act or the Canadian-American Reciprocal Agreement of 1949 authorizes Immigration Officers to create an entry status for an alien who is regarded by them to be inadmissible to the United States?

2. Whether the Immigration Service should be estopped from deporting an alien whose deportability is predicated upon an "entry" that should instead have been a parole?

3. Whether an alleged ground of excludability could be invoked against an alien who neither explicitly nor implicitly sought admission into the United States?

Table of Cases

Other Authorities

Relevant Statutes

Section 241(a)(1) of the I&N Act, 8 U.S.C. §1251(a)(1)

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who -
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

Section 212(a)(16) of the I&N Act, 8 U.S.C. §1182(a)(16)

> Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> (16) Aliens who have been excluded from admission and deported and who again seek admission within one year from the date of such deportation, unless prior to their reembarkation at a place outside the United States or their attempt to be admitted from foreign contiguous territory the Attorney General has consented to their reapplying for admission;

Section 101(a)(13) of the I&N Act, 8 U.S.C. §1101(a)(13)

> The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States for the purpose of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary, departure

from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.

UNITED STATES COURT OF APPEALS
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STANFORD GEORGE BOOTHE, : Docket No. 76-4040

Petitioner, :

- v - :

IMMIGRATION AND NATURALIZATION SERVICE, :

Respondent. :

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PETITIONER'S BRIEF

Statement of the Case

Pursuant to Section 106 of the Immigration and Nationality Act (the "I&N Act"), 8 U.S.C.§1105(a), Stanford George Boothe petitions this Court to review a final order of deportation rendered by the Board of Immigration Appeals (the "Board") on October 2, 1975 and reaffirmed in two decisions on January 12, 1976 and February 4, 1976, respectively. That order dismissed an appeal from a decision of an Immigration Judge in which petitioner was found deportable from the United States under Section 241(a)(1) I&N Act, 8 U.S.C. §1251 (a)(1), a statute providing for the deportation of aliens who at entry were within one or more of the classes of aliens excludable from entering the United States.

Under the Board's order, petitioner is

considered deportable as charged because he is regarded as a previously excluded and deported person who had reentered the United States from Canada on October 8, 1974, without the special consent required to be obtained from the Attorney General. Therefore, at the time of alleged reentry, he was among that class of excludable aliens, specified in Section 212(a)(16) I&N Act, 8 U.S.C. §1182(a)(16), who are excludable if in seeking readmission or attempting to reenter within one year of prior exclusion and deportation they do not first obtain special consent from the Attorney General. Petitioner contends that he is not deportable as charged, for the reason that not only he did not make an "entry" as alleged by respondent, but also because obtaining of the Attorney General's consent for reentry was a requirement which was inapplicable to petitioner.

Statement of Facts

Petitioner is a 57 year old male, native and citizen of Jamaica, W. I. who has resided continuously in the United States since 1966 when he was first admitted as a lawful permanent resident. He had been officially recognized by respondent as a lawful permanent

resident, up until October 8, 1974 when he was found excludable at an exclusion hearing at Buffalo, New York.

The circumstances leading up to his exclusion and loss of permanent residence status began sometime in the month of August, 1974 when an acquaintance of petitioner, a male Jamaican with a girlfriend in Canada discussed with petitioner a desire to assist his girlfriend to come into the United States. Petitioner who had by coincidence found an alien registration card belonging to a female, suggested that perhaps the use of this card could secure the desired entry of the Jamaican lady. Petitioner and his fellow Jamaican male friend agreed upon the sum of two hundred sixty dollars ($260.00) as being a reasonable amount that would defray the cost of travel to Canada and offset the loss of pay from petitioner's job.

However, petitioner never actually realized this amount and indeed sustained a loss when the amount of $260.00 was stolen, along with other valuables, from his apartment in New York. Petitioner reported the loss to the New York City Police Department and proceeded to Canada not anticipating any additional payment, desiring to honor his "commitment" to his fellow Jamaicans. Petitioner met with the Jamaican lady and after spending three days of visiting with friends and relatives in Canada, petitioner and the lady boarded a bus bound for

New York and they both appeared for immigration inspection before separate officers of the Immigration and Naturalization Service.

Petitioner was inspected and readily admitted upon the showing of his alien registration card and he proceeded to get back on the bus from which all passengers had disembarked for inspection by Immigration and Customs officials. The "lady companion" was detected as an impersonator of the owner of the lost card given to her by petitioner. She implicated petitioner in her attempted illegal entry and petitioner was arrested.

Petitioner was advised of his right to counsel, and at first indicated that he wanted a lawyer. He thereafter waived that right after being assured by the arresting officer that criminal prosecution of petitioner would be replaced by non-criminal immigration proceedings and that petitioner would not need a lawyer since he could return to the United States within one year of exclusion. A sworn statement was then taken from petitioner, and the substance of this statement was repeated at petitioner's exclusion hearing, at which he appeared without counsel.

At that hearing petitioner, without counsel, never raised the legal issue of whether the special circumstances of his actual loss constituted a valid defense to excludability under Section 212(a)(31).

Neither did petitioner raise the jurisdictional question as to whether he was properly in exclusion instead of expulsion proceedings. Petitioner was found excludable and an order for his exclusion and deportation was entered but never executed. The attempt to deport him to Canada was thwarted by Canadian border officials who gave him an exclusion hearing of their own and ordered him deported to the physical custody of accompanying immigration officers from the United States side of the border.

After the Canadian exclusion/deportation, United States immigration officers were obliged to accept petitioner under terms of a Canadian-American Reciprocal Agreement and provided him with an "entry" document which became the basis for the "entry" upon which his present deportation charge was based. The entire episode when petitioner was a ping-pong at the border lasted a mere fraction of time and is described by respondent's trial attorney as a momentary one.

Petitioner was now put under expulsion proceedings (Section 241(a)(1) of the I&N Act) as one who, after prior exclusion and deportation, reentered the United States without first obtaining the Attorney General's consent (Section 212(a)(16) I&N Act, 8 U.S.C. §1182(a)(16). This was a supplemental excludable ground which was added to an earlier one charging that

petitioner, as an intending immigrant, did not have an immigrant visa when he was given the "entry" document under the Reciprocal Agreement. [Section 212(a)(20) 8 U.S.C.§1182(a)(20)]. Only the excludability ground under Section 212(a)(16) was pursued. At the expulsion hearing petitioner was represented by counsel but counsel was not permitted to attack any of the crucial evidence submitted in support of petitioner's alleged excludability at alleged reentry. The Immigration Judge had indicated that such evidence of prior exclusion was in the form of executed orders which were not subject to collateral attack. Petitioner appealed the finding of deportability.

After the appeal was dismissed, petitioner made two motions to reconsider the dismissal of his appeal, the first of which was denied with reasons but the last motion was summarily rejected on February 4, 1976, in conjuction with a request for stay of deportation that was scheduled for February 5, 1976. Petitioner had no choice but to come to this Court to ask for relief. Subsequent to the filing of this petition on February 4, 1976 the Board rendered a detailed decision dated March 2, 1976 apparently as a supplementary explanation of the summary denial of February 4, 1976. Unfortunately the Board acted under the misunderstanding that the within

petition was pending at the time when petitioner made his last motion to reconsider.

Petitioner requested the Board to make an appropriate correction as to the chronology of events and the Board has done so in a letter included in the appendix to petitioner's brief so as to offset any possible adverse effect from the inclusion in the administrative record of the Board's decision of March 2, 1976. Even though the Board's action was final on February 4, 1976, petitioner will make no attempt to preclude that decision from the record of proceedings since inclusion of same will facilitate the Court's opportunity to better review respondent's actions.

Summary of Argument

It is charged that petitioner reentered the the United States on October 8, 1974 but at that time he was a previously excluded and deported alien who required the Attorney General's consent to reapply for admission and that he had failed to meet this requirement. Deportability, as charged, cannot be sustained unless there is clear, convincing and unequivocal evidence of three factors, namely, that on October 8, 1974 he was a previously excluded person, that he reentered the United States and that he was required to obtain the Attorney General's special consent but failed to do so.

The deportation charge is not established if there is a failure to sustain any one of these interdependent elements.

Petitioner contends that he never made an entry into the United States on October 8, 1974; that the substantiality of evidence of prior exclusion and deportation is questionable; and that the requirement to obtain consent from the Attorney General was inapplicable to him.

I

PETITIONER'S DEPORTABILITY CANNOT BE SUSTAINED UNDER SECTION 241(a)(1) SINCE HE DID NOT MAKE AN ENTRY ON OCTOBER 8, 1974.

Petitioner has been found deportable as one who was excludable at the time of "entry" on October 8, 1974. Without conceding that he was excludable, petitioner submits that there was no entry as a matter of law, if even respondent's assertions are accepted as correct, that petitioner had left the United States for a brief moment on October 8, 1974. In fact if respondent regarded petitioner as being excludable on October 8, 1974, it is inconceivable that respondent would issue an "entry" document and not a "parole" document to an alien it regarded as an inadmissible alien.

The basic premise of the immigration laws is that no alien may enter the United States unless his entry is authorized by statute. (See Gordon & Rosenfeld,

Immigration Law & Procedure, Vol. I P.2-8). There is no statute authorizing the "entry" of an alien regarded as inadmissible, except by waiver of the ground of inadmissibility. An inadmissible alien whose "return" to the United States is mandated by an International Border Agreement can only be permitted to come into the United States as a parolee. (See Section 212(d)(5) of the Act, 8 U.S.C. §1182(d)(5). Even if an immigration officer creates an "entry" for an alien, such entry must be subject to its correctness as a matter of law and the fact of the entry created by the officer has no binding effect. Lazarescu v. INS, 199F.2d. 898 [C.A. Md. 1952.]). While respondent has plenary power in matters of discretion, its authority to create an "entry" is found only within the zone of authority charted in Section 211(b), Section 212(a), Section 213, Section 214, Section 235, Section 236, Section 237, Section 240 of the I&N Act. (Respectively under 8 U.S.C. §1181(b), §1183, §1184, §1225, §1226, §1227, §1230.)

Respondent departed from the zone of authority charted in the Immigration and Nationality Act and the Canadian-American Reciprocal Agreement when it permitted an alien regarded as inadmissible to come into the United States in a status other than that of a parolee.

Respondent's departure from the zone of authority charted in the statute is an action that should be corrected by the Court. Gegion v. Uhl, 239 U.S.3, 36 S.Ct.2, 60 L.Ed. 114(1915). (See also as to general proposition that agency action must be set aside if in excess of statutory authority. General Motors Corp. v. U.S.207,F.Supp. 641,(D.C. Mich. 1962) aff'd. 324F.2d. 604). Moreover, petitioner should not incur the deportation hazards of a person making an entry when "entry" arose from respondent's affirmative misconduct in not designating petitioner a parolee. (See Corniel-Rodriquez v. INS., 75-4096 2d.Cir.(1976) as to general proposition that alien should not suffer the consequences of respondent's affirmative misconduct). Section 101(a)(13) of the Act, 8 U.S.C. §1101(a)(13) defines entry as follows:

> "The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary,

> departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception."

Under its explicit language an entry occurs whether the coming is "voluntary or otherwise". However, an alien coming from a foreign port or place makes an entry only when he is on our soil and free from official restraint. In re Dubbiosi, 191 F.Supp. 65 (E.D. Va. 1961). Matter of Pierre, decided by the Board October 5, 1973, Lazarescu v. INS., supra; U.S. v. Vasilatos, 209 F.2d. 195 (3rd Cir.1954); Klupholtz v. Esperdy, 302 F.2d. 928 (2nd Cir. 1962), cert. denied 371 U.S. 891. (See also Gordon & Rosenfeld Immigration Law & Procedure, Vol. I, P. 4-29). In petitioner's circumstances, Section 101(a)(13) must be read in the context of the fact that if any "coming" into the United States did occur, as alleged, it was with the continuing knowledge of respondent, which had petitioner in its custody and which should have issued a "parole slip" instead of an "entry slip". (See concurring opinion of Board of Immigration Appeals Member Irving Appleman, Appendix 2A).

Petitioner does not concede in the foregoing argument that he had come into the United States on October 8, 1974. Petitioner actually contends that he was never removed from the United States during the period that Canadian border officials had thwarted

respondent's attempt at executing the exclusion order. This particular contention is more fully set forth in connection with a separate argument, infra.

Petitioner submits that in the absence of an "entry" October 8, 1974, his deportability cannot be established under Section 241(a)(1) as one who was excludable at entry. Deportation charges predicated upon inadmissibility at "entry" cannot be sustained if there was no entry as a matter of law, regardless of whether inadmissibility arguably may or may not have existed. Fleuti v. Rosenberg 374 U.S. 449 (1963). (See Gordon & Rosenfeld Immigration Law & Procedure, Vol. I P. 4-29).

II

THERE WAS NO AMELIORATION OF THE INJURY TO PETITIONER WHICH RESULTED FROM RESPONDENT'S FAILURE TO FOLLOW ITS OWN REGULATIONS WHEN PETITIONER WAS DESIGNATED AN ENTRANT RATHER THAN A PAROLEE.

It has been suggested in a concurring opinion of the Board, Appendix 2A, that petitioner actually benefited from the government's error when as an entrant he received the greater benefit of a deportation hearing, as against the lesser benefits available in a new exclusion hearing if petitioner had been designated a parolee. Petitioner contends that deportation after expulsion proceedings creates a permanent exile, except

if special permission is granted by the Attorney General. Deportation after exclusion creates a one-year bar and unless the alien desires to reenter the United States within one year he does not require the special permission of the Attorney General. (See 12 I&N Dec. 462,

> ".....We believe it is clear, from the language of sections 212(a)(16) and 212(a)(17), that deportation after expulsion proceedings in the United States has different attributes and consequences from deportation after exclusion. Deportation after expulsion proceedings erects a life-long bar to admissibility unless permission to reapply for admission is obtained from the Attorney General, who may grant or deny such permission in his discretion. Deportation after exclusion creates a temporary bar, lasting for a year and then losing all effect automatically, without the necessity for application or permission of any kind. This provision, now section 212(a)(16), was originally enacted as part of section 3 of the Act of 1917; its re-enactment without change was recommended by the Committee on the Judiciary, in its Report #1515, 81st Cong., Second Section (at p.364) for the following reasons:
>
> * * * the law as it is now written is adequate to prevent the abuse of the exclusion and deportation laws by aliens who attempt to re-apply for admission to the United States soon after their exclusion or deportation, as well as to allow reconsideration when the alien is able to overcome the handicaps which brought about the original exclusion and deportation. (Emphasis supplied.)

Therefore if petitioner's deportation occurs from the deportability contested herein, an injustice would be created in the manner described above. Any amelioratory benefit that was derived from the due process protection of a deportation hearing is now far outweighed by the actuality of a permanent exile if petitioner's deportation is not set aside. The punishment prescribed by statute under petitioner's exclusion for having assisted another alien to illegally enter the United States is a one-year exile from deportation after exclusion. This present deportation order would have the effect of inflicting far greater punishment than required by law.

It is also submitted that if petitioner were designated a parolee and given an exclusion hearing, there were substantial defenses to excludability which are beyond the scope of review in this petition.

III

ON OCTOBER 8, 1974 THE REQUIREMENT OF THE ATTORNEY GENERAL'S CONSENT TO REAPPLY FOR ADMISSION WAS INAPPLICABLE TO PETITIONER BECAUSE HE WAS NOT SEEKING READMISSION ON THAT DATE.

The Immigration Service has charged deportability for entering while excludable under Section 212(a)(16) 8 U.S.C.§1182(a)(16).

> "Aliens who have been excluded from admission and deported and who again seek admission within one year from the date of such deportation, unless prior to their reembarkation at a place outside the United States or their attempt to be admitted from foreign contiguous territory the Attorney General has consented to their reapplying for admission."

The record of proceedings indicate that after petitioner's exclusion hearing on October 8, 1974 there was an unsuccessful attempt to deport him to Canada. The record clearly indicates, at P.18 of the transcript and on P. 2 of the concurring opinion of Board member Irving Appleman, that he did not seek readmission during the time that the Canadians were excluding and deporting him from Canada. Neither did he seek readmission prior to or at the point of his "admission" under the Reciprocal Agreement.

It is contended that, under 8U.S.C.§1182(a)(16), the requirement for the Attorney General's consent to be given to reapply for admission is applicable only to aliens explicitly or implicitly seeking readmission or similarly attempting to reenter within one year of exclusion and deportation. This view of petitioner is shared by Board Member Appleman. Petitioner's view is suggested by the Board in the cited paragraphs in 12 I&N Dec. 462, supra and finds strong support in two precedent decisions of the Board, Matter of Grandi, 13 I&N Dec. 798, (decided on other related issue); Matter of Campos, 13 I&N Dec. 148,

(decided on other related issue.) In the latter two cases the aliens claimed, among other things, that they were not seeking admission into the United States and therefore the particular grounds of inadmissibility and excludability were inapplicable. The Board rejected these specific contentions for the reason that the record established that in each case the aliens were implicitly seeking admission into the United States. See also Campos v. INS, 402 F.2d.758; U. S. v. Grandi, 424 F.2d.399. Since deportation under 8 U.S.C.§1251(a)(1) is a form of delayed exclusion, the post hoc determination as to whether excludability existed at the time of entry must also meet the test that the alien must have been explicitly or implicitly seeking admission before the exclusion sanction is imposed.

If petitioner was accorded an "entry" status by respondent, the entry status itself inheres within it a waiver of any grounds of excludability or inadmissibility. If petitioner did enter, as alleged, the alleged inadmissibility was waived and such inadmissibility could not be a basis for deportability based on a charge that petitioner was inadmissible at entry. If petitioner's deportability is assessed from a position best suited to respondent, deportability as charged cannot be established in the absence of an "entry" or in the absence of "excludability" at the time of such alleged "entry".

IV

THERE IS NO SUBSTANTIAL EVIDENCE THAT PETITIONER WAS A PREVIOUSLY EXCLUDED ALIEN AT THE TIME OF ADMISSION UNDER THE RECIPROCAL AGREEMENT.

Respondent insists that it has established by clear, convincing and unequivocal evidence that petitioner was a previously excluded and deported alien who required the Attorney General's consent to reapply and had failed to meet this requirement. Petitioner contends that since the deportation charge contains as an important element, that he was a previously excluded and deported alien, there can be put in issue the question of whether he was a previously excluded and deported alien. In the immediately foregoing argument, without conceding that he was a previously excluded and deported person, petitioner had concentrated his arguments on that portion of the excludable ground which pertains to the failure of petitioner to obtain the Attorney General's consent prior to entry. Petitioner's immediate argument is now directed towards that portion of the excludable ground which alleges that he was a previously excluded and deported person.

Petitioner submits that the exclusion order by United States Immigration Judge Maltin and the exclusion order by the Canadian border officials would, if standing alone, constitute clear, convincing and unequivocal evidence that he was excluded and deported from the United States on October 8, 1974. However,

there is evidence that detracts from the weight and substantiality of the evidence of petitioner's exclusion, provided through the exclusion orders mentioned above, and under the test of substantiality set forth in Universal Camera Corp. v. NLRB,340 U.S.474.

For example, petitioner contends that the proceedings under which he was ordered excluded were a nullity for three reasons involving jurisdictional questions and which do not involve the actual determination made in the exclusion hearing.* It is submitted that petitioner should have been given a deportation hearing on October 8, 1974 under the charge of attempting to smuggle an alien into the United States. In this regard, petitioner had contended in his supplemental memorandum of November 14, 1975 (Item #6 of Administrative Record) and in his affidavit of November 13, 1975 (Item #7 of Administrative Record) that he had already entered the United States on October 5, 1974 when he was first questioned about the attempted smuggling of another alien. The Board in its decision of January 12, 1976 never decided the issue of petitioner's contention that he should have been given a deportation hearing because he had already entered the United States on October 5, 1974.

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*Petitioner believes that the issue of the nullity of the proceedings, particularly as it relates to the issue of the substantiality of evidence of exclusion, are reviewable by this Court when reviewing the evidence of deportability pursuant to the substantial evidence standard of 8 U.S.C.§1105(a).

Petitioner had also contended that as a legal resident of the United States it was a misapplication of the Act to put him under exclusion proceedings. Stacher v. Rosenberg, 216 F.Supp.511,514(D.C. Cal.1963); Maldonado Sandoral v. INS,No. 72-2023,(9th Cir.,May,1975). The Board rejected this contention as well as petitioner's contention that the denial of petitioner's asserted right to counsel effectively deprived him of providing the valid defense (which he had) against the charge of excludability in his original proceedings and for those reasons the evidence of previous excludability was questionable. Petitioner submits that since evidence of prior exclusion was an essential ingredient in his deportation charge, he should have been permitted a collateral attack on such evidence on the question of the validity of the order on jurisdictional grounds and particularly since petitioner attempted to lay the groundwork for such attack by referring to the non-execution of the exclusion, such non-execution arising from the thwarting by Canadian border officials of the attempt, during the fraction of time involving the events which occurred after the exclusion order was entered. (See Transcript of Hearing November 26, 1974, Item #26 of Administrative Record. See also Appendix 2A - Concurring Opinion of Board Member Appleman.)

Conclusion

Petitioner submits that since at least one of the three interdependent elements of deportability has not been established, the deportation charge cannot be considered as sustained and respectfully prays for an order setting aside the order of deportation; or for an order remanding the proceedings to the Immigration authorities; and for any further relief deemed just by the Court.

Respectfully submitted

Dated: July 9, 1976

PAUL RUBIN
Attorney for Petitioner

APPENDIX

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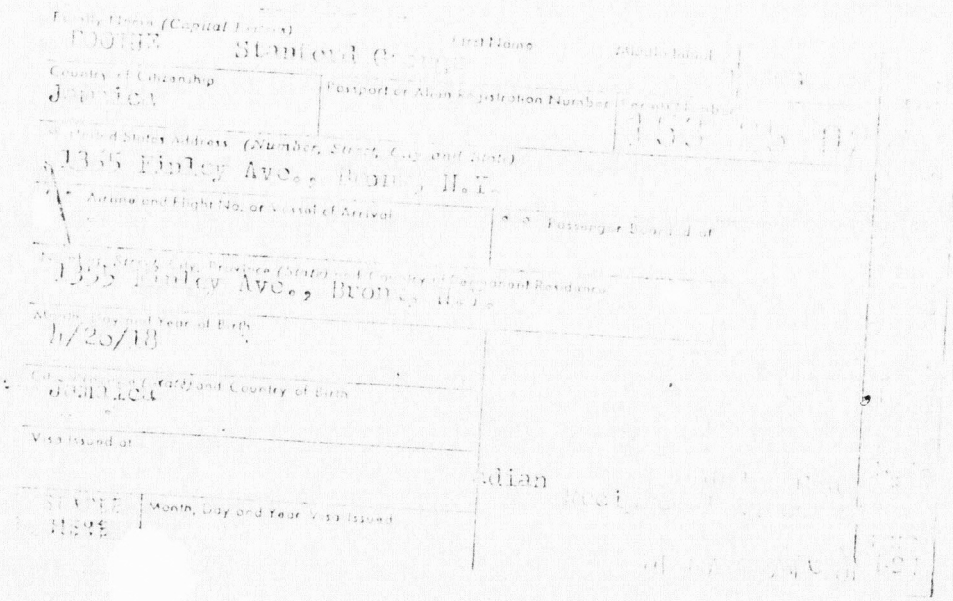

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(Rev. 6-1-

United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

File: A17 595 273 - Buffalo

In re: STANFORD GEORGE BOOTHE

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Paul Rubin, Esquire
3 West 57th Street
New York, New York 10019

CHARGES:

Order: Sec. 241(a)(1), I&N Act (8 U.S.C. 1251 (a)(1)) - Excludable at entry - no valid unexpired immigrant visa

Sec. 241(a)(1), I&N Act (8 U.S.C. 1251 (a)(1)) - Excludable at entry - previously deported, no permission to reapply for admission

APPLICATION: Motion to reconsider

CONCURRING OPINION: Irving A. Appleman, Board Member

I concur in the decision in this case. The respondent is clearly here in violation of law. He was properly found excludable and whatever claim he had to lawful residence terminated upon his exclusion and deportation. The exclusion was proper and there was no gross miscarriage of justice to sustain a collateral attack on the executed order. See De Souza v. Barber, 263 Fed. 470 (9 Cir. 1959), cert. denied, 359 U.S. 989 (1959). He is an immigrant and is here without a document and clearly deportable on that ground.

I am concerned, however, over the applicability of the charge based on lack of permission to reapply for admission. Immediately following the exclusion hearing, the respondent was presented to the Canadian Immigration authorities

at the Canadian end of the Peace Bridge, Fort Erie, Ontario. They accepted him long enough to conduct a deportation hearing and prepare an order of deportation (exhibit 5) and then returned him, forthwith, to the United States for acceptance under the Reciprocal Agreement. The D/A describes the operation as a "momentary" one. (Tr. page 1).

There is nothing to indicate that the respondent was ever given the slightest opportunity to apply for permission to reapply for admission after exclusion. Indeed, it seems somewhat anomalous that the Immigration and Naturalization Service permitted entry, as they did (See Exhibit 6). It is doubtful that under circumstances such as these the Reciprocal Agreement requires anything more than that on return the alien be paroled into the United States under section 212(d)(5) of the Act (8 U.S.C. 1182(d)(5)).

Had that been done, we would now be in exclusion proceedings rather than deportation. However, since an alien is in a favored position in expulsion proceedings vis a vis exclusion, (see Maldonado-Sandoval v. INS, 518 F.2d 276 (9 Cir. 1975)), he was not prejudiced and can hardly complain in this regard. Similarly, with respect to permission to reapply for admission, he could now apply for permission, nunc pro tunc, but in view of his lack of an immigrant visa, the application would necessarily have to be denied since the grant would serve no useful purpose (See Matter of Vrettakos, ID 2265 (BIA 1973; 1974)).

For the above reasons, I see no useful purpose to be served in reopening these proceedings and concur in the denial of the motion for reconsideration.

Irving A. Appleman
Board Member

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UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS
Washington, D.C. 20530

April 12, 1976

In re: STANFORD GEORGE BOOTHE
File: A17 595 278

Paul Rubin, Esquire
3 West 57th Street
New York, New York 10019

Dear Mr. Rubin:

This is in response to your letter of April 2, 1976, concerning the date on which you filed the Petition for Review in this case. We are no longer in possession of the record of proceedings in this case, and we therefore cannot determine the precise dates on which the relevant documents were submitted. Nevertheless, it does appear likely that the Petition for Review was not filed until after you submitted your most recent motion to reconsider.

To the extent that our order of March 2, 1976 could be interpreted as implying a contravention of the precise terms of 8 C.F.R. 3.8(a), we apologize. While knowledge of pending court action is important, we recognize that the regulations do not specifically require the furnishing of such information if the Petition for Review is filed after the filing of a motion with the Board.

If you remain concerned that your client will be unduly prejudiced by language in our order of March 2, 1976, please feel free to provide the court with a copy of this letter. Be assured that what we initially perceived as a "contravention of the requirements of 8 C.F.R. 3.8(a)" in no way affected our ruling on the merits of your motion.

Sincerely yours,

David L. Milhollan
Chairman